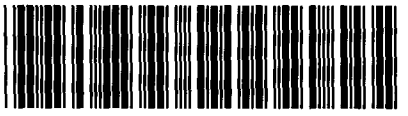

Control Number: 49154

Item Number: 17

Addendum StartPage: 0

Docket No. 49154

RATEPAYERS' APPEAL OF THE DECISION BY LAGUNA MADRE WATER DISTRICT TO CHANGE RATES	§ § § §	PUBLIC UTILITY COMMISSION OF TEXAS

RATEPAYERS' REPLY TO PLEADINGS FILED BY COMMISSION STAFF AND LAGUNA MADRE WATER DISTRICT

COMES NOW, South Padre Island Golf Course via the undersigned SPI Golf Homeowners JV, Inc. ("Ratepayers"), and pursuant to Order No. 4 Requiring Ratepayers' Reply issued by Administrative Law Judge Hunter Burkhalter of the Public Utility Commission of Texas, offers the following:

I. PUBLIC UTILITY COMMISSION'S JURISDICTION

1.1. Texas Water Code §12.013(a) plainly states that, "The utility commission shall fix reasonable rates for the furnishing of raw or treated water for any purpose mentioned in Chapter 11 or 12 of this code." *See Exhibit A, Texas Water Code §12.013, Rate-fixing Power.* Texas Water Code §12.001 states that, "The definitions contained in Subchapter A, Chapter 11 of this code apply to this chapter." Texas Water Code §11.002(21) defines "Utility commission" as "the Public Utility Commission of Texas." The Public Utility Commission ("PUC") has jurisdiction to fix reasonable rates for the furnishing of raw or treated water for any purpose mentioned in Chapters 11 or 12 of the Texas Water Code.

1.2. As cited in Section 3.2 of Ratepayers First Amended Petition, Texas Water Code §11.036 provides that an irrigation district having in possession and control any conserved or stored water may contract to supply the water to any person, association, or corporation. It further provides that the price and terms of the contract

17

shall be just and reasonable and without discrimination, and the contract is subject to the same revision and control as provided in the Texas Water Code for other water rates and charges. The matter at issue is the supply of water by Laguna Madre Water District ("LMWD"), an irrigation district in possession and control of conserved/stored water, to Ratepayers, a corporation. *See Ratepayers First Amended Petition generally.*

1.3. As further cited in Section 3.3 of Ratepayers' First Amended Petition, Texas Water Code §11.041 provides for a complaint in the event of a denial of water or the demand of a price or rental for the available water that is not reasonable and just, or is discriminatory. In their First Amended Petition, Ratepayers complained that LMWD demands a price for water that is unreasonable and unjust. *See Ratepayers First Amended Petition §§2.1, 3.4, 4.2, 9.1.*

1.4. As shown hereinabove, Ratepayers' petition that the PUC review the rates charged by LMWD for irrigation/raw water fall within the scope of Texas Water Code §12.013(a), and therefore, the jurisdiction of the PUC.

II. REPLY TO PUBLIC UTILITY COMMISSION'S STAFF AND LAGUNA MADRE WATER DISTRICT'S RECOMMENDATIONS AND MOTIONS TO DISMISS

2.1. "In 2013, the Texas Legislature transferred the economic regulation of water and sewer utilities from the Texas Commission on Environmental Quality (TCEQ) to the PUC. This transfer involved the programs dealing with the regulation of water and sewer rates and services, Certificates of Convenience and Necessity (CCNs) and Sale/Transfer/Mergers." *See Exhibit B, Public Utility Commission of Texas, About the PUCT, https://www.puc.texas.gov/agency/about/mission.aspx.*

2.2. The PUC Staff and LMWD incorrectly assert that Texas Water Code §12.013(d) limits the grant of jurisdiction under Texas Water Code §12.013 to "irrigation water furnished 'to another political subdivision on a wholesale basis.'" *See Commission Staff's Second Recommendation and Motion to Dismiss, §2, paragraph 2. See also Laguna Madre Water District's Response to South Padre Island Golf Course via SPI Golf Homeowners JV, Inc. First Amended Petition Appealing Raw Water Rate, §§3-4.* There is nothing in Section 12.013 of the Texas Water Code that limits the grant of jurisdiction concerning irrigation water to that furnished, "to another political subdivision on a wholesale basis," as alleged by the PUC, and to be clear, Ratepayers are not arguing that they qualify as a political subdivision of the state. Instead, the correct interpretation of Texas Water Code §12.013(d) requires a review of the entirety of Texas Water Code §12.013, which follows:

2.3. Subsection (a) of §12.013 of the Texas Water Code sets out the purpose of the section, which is broad as shown hereinabove. Subsection (b) points out the definition of "political subdivision" as it is not elsewhere defined in Chapters 11 or 12, for the purpose of reading subsection (d), which is to follow. Subsection (c) sets out the discretion the PUC has in reviewing and fixing reasonable rates for water. Subsection (d) limits the jurisdiction of the PUC under this section "relating to" cities, towns, or villages for the wholesale of water by cities, towns, or villages to other cities, towns, villages, counties, river authorities, water districts, and other special purpose districts.

2.4. "The Legislature granted the Commission broad authority in this area: 'The commission shall fix reasonable rates for the furnishing of raw or treated water **for any purpose mentioned in Chapter 11 or 12 of this code**." (emphasis ours). *See Exhibit*

C, Texas Water Com'n v. Boyt Realty Co., 10 S.W.3d 334, 338 (Tex.App.—Austin 1993), citing Texas Water Code §12.013. In *Texas Water Commission v. Boyt*, the appellate court went on to state that, "the Legislature impliedly intends an administrative agency to have the necessary powers to perform its required functions." *Id.* at 338, citing *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137 (Tex.App.—Austin 1986, writ ref'd n.r.e.). The purchaser of irrigation water in the underlying dispute in *Texas Water Commission v. Boyt* was a group of customers who formed the Devers Canal Rice Producers Association, Inc., was a private entity like Ratepayer, not a political subdivision entity. There was no question the commission had the right to fix rates for a non-political subdivision pursuant to §12.013 of the Texas Water Code; the question was simply whether it had the authority to set rates beyond a contractual period.

2.5. In *Trinity River Authority of Texas vs. Texas Water Rights Commission,* the appellate court held that the Trinity River Authority and its rice farmer customers were subject to the rate-making jurisdiction of the commission. *See Exhibit D, Trinity River Authority of Tex. v. Texas Water Rights Commission*, 481 S.W.2d 192 (Tex.Civ.App.—Austin 1972, writ ref'd n.r.e.). Again, there was no question that the commission had jurisdiction to fix water rates for non-political subdivision entities.

2.6. On March 5, 1985, the Office of the Attorney General of Texas issued an opinion in response to the question of what governmental agency or body has jurisdiction over the rates charged to customers outside the boundaries of a utility district. *See Exhibit E, Tex. Atty. Gen. Op. JM-297* (Tex.A.G.), 1985 WL 189729. The Office of the Attorney General of Texas summarized its response as follows: "The

Lakeway Municipal Utility District is authorized...to fix water rates charged to residents of the Village of Lakeway. In addition, the Texas Water Commission has jurisdiction, pursuant to sections 11.041 and 12.013 of the Water Code, to review the rates charged by the District as to reasonableness." *Id.* The Attorney General could not have stated it any more clearly: §12.013 of the Texas Water Code applies to non-political subdivisions.

2.7. A plain and logical reading of §12.013 of the Texas Water Code shows that subsection (d) limits the jurisdiction of the PUC with respect to disputes concerning wholesale between political subdivisions, but does not limit subsection (a). Otherwise, subsection (a) could have just said, "The utility commission shall fix reasonable rates for the furnishing of wholesale raw or treated water as between political subdivisions only." The foregoing, coupled with a review of relevant case law, makes clear that the PUC has jurisdiction to hear Ratepayers underlying petition, as amended. Accepting the PUC Staff and LMWD's interpretation of §12.013 of the Texas Water Code would wholly disregard the legislature's intent, the opinion of the Attorney General, and contradict case law.

III. TEXAS OPEN MEETINGS ACT

3.1. Ratepayers do not seek enforcement of the Texas Open Meetings Act by this court. Rather, they simply point out the violation of this Act by LMWD and its Directors in order to show evidence of LMWD's bias or prejudice in setting unreasonable, unjust, and excessive rates for sale of raw/irrigation water to Ratepayers. After all, this is at least in part what has prompted Ratepayers' petition for review by the PUC.

IV. Prayer

4.1. Ratepayers pray that the Public Utility Commission find that the rates charged to Ratepayers by LMWD are unfair, unjust, unreasonable, and illegal. Ratepayers further pray that the Public Utility Commission establish just and reasonable rates for Ratepayers to purchase irrigation raw water (untreated water), in accordance with applicable laws and principles of equity and fairness. Ratepayers seek damages, a refund in the difference of the rate as of the date of its original petition and the rate set by the Public Utility Commission, plus interest. Ratepayers request such other and further relief, at law or in equity, to which they may show themselves justly entitled.

Respectfully submitted,

ROYSTON, RAYZOR, VICKERY & WILLIAMS, L.L.P.

By: ***/s/ Liliana Elizondo***

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Certificate of Service

I hereby certify, that a true and correct copy of the above and foregoing document was served via facsimile, certified mail/regular U.S. first class mail, and/or e-mail upon the following counsel of record on this the 15th day of April 2019.

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Vernon's Texas Statutes and Codes Annotated
Water Code (Refs & Annos)
Title 2. Water Administration (Refs & Annos)
Subtitle B. Water Rights
Chapter 12. Provisions Generally Applicable to Water Rights (Refs & Annos)
Subchapter B. General Powers and Duties Relating to Water Rights

V.T.C.A., Water Code § 12.013

§ 12.013. Rate-fixing Power

Effective: September 1, 2013
Currentness

(a) The utility commission shall fix reasonable rates for the furnishing of raw or treated water for any purpose mentioned in Chapter 11 or 12 of this code.

(b) In this section, "political subdivision" means incorporated cities, towns or villages, counties, river authorities, water districts, and other special purpose districts.

(c) The utility commission in reviewing and fixing reasonable rates for furnishing water under this section may use any reasonable basis for fixing rates as may be determined by the utility commission to be appropriate under the circumstances of the case being reviewed; provided, however, the utility commission may not fix a rate which a political subdivision may charge for furnishing water which is less than the amount required to meet the debt service and bond coverage requirements of that political subdivision's outstanding debt.

(d) The utility commission's jurisdiction under this section relating to incorporated cities, towns, or villages shall be limited to water furnished by such city, town, or village to another political subdivision on a wholesale basis.

(e) The utility commission may establish interim rates and compel continuing service during the pendency of any rate proceeding.

(f) The utility commission may order a refund or assess additional charges from the date a petition for rate review is received by the utility commission of the difference between the rate actually charged and the rate fixed by the utility commission, plus interest at the statutory rate.

Credits

Added by Acts 1977, 65th Leg., p. 2207, ch. 870, § 1, eff. Sept. 1, 1977; Acts 2013, 83rd Leg., ch. 170 (H.B. 1600), § 2.07, eff. Sept. 1, 2013; Acts 2013, 83rd Leg., ch. 171 (S.B. 567), § 7, eff. Sept. 1, 2013.

V. T. C. A., Water Code § 12.013, TX WATER § 12.013
Current through the end of the 2017 Regular and First Called Sessions of the 85th Legislature

Exhibit A

End of Document

About the PUCT

Mission & History

Mission:

We protect customers, foster competition, and promote high quality infrastructure.

What We Do:

The Public Utility Commission of Texas regulates the state's electric, telecommunication, and water and sewer utilities, implements respective legislation, and offers customer assistance in resolving consumer complaints.

Our History:

In 1975, the Texas Legislature enacted the Public Utility Regulatory Act (PURA) and created the Public Utility Commission of Texas (PUC) to provide statewide regulation of the rates and services of electric and telecommunications utilities. Although the PUC originally regulated water utilities, jurisdiction was transferred to the Texas Water Commission in 1986. Significant legislation enacted by the Texas Legislature in 1995, along with the Federal Telecommunications Act of 1996 (FTA), dramatically changed the PUC's role by allowing for competition in telecommunications wholesale and retail services, and by creating a competitive electric wholesale market. In 1999, the Texas Legislature provided for the restructuring of the electric utility industry, allowing certain customers electric choice.

The PUC's mission and focus have shifted from regulation of rates and services to oversight of competitive markets and compliance enforcement of statutes and rules for the electric and telecommunication industries. Effective oversight of competitive wholesale and retail markets for electric and telecommunication is necessary to ensure that customers receive the benefits of competition. For water and sewer utility service, however, the focus remains on the regulation of rates and services.

The PUC continues to perform its traditional regulatory function for electric transmission and distribution utilities across the state. Additionally, while integrated electric utilities outside of the ERCOT power grid remain fully regulated by the PUC, the PUC is increasingly involved in multi-state efforts to implement wholesale electric competitive market structures and transmission planning in the Southwest Power Pool (SPP) and Midcontinent Independent System Operator (MISO) areas.

In 2013, the Texas Legislature transferred the economic regulation of water and sewer utilities from the Texas Commission on Environmental Quality (TCEQ) to the PUC. This transfer involved the programs dealing with the regulation of water and sewer rates and services, Certificates of Convenience and Necessity (CCNs) and Sale/Transfer/Mergers.

Exhibit B

10 S.W.3d 334
Court of Appeals of Texas,
Austin.

TEXAS WATER COMMISSION, Trinity Water Reserve, Inc., d/b/a Devers Canal System and Devers Canal Rice Producers Association, Inc., Appellants,
v.
BOYT REALTY CO., J & E Farms, Inc., Three Dailey Farms, Inc., J.M. Frost, III and Ford J. Frost, Appellees.

No. 3-91-279-CV.
|
June 23, 1993.

Synopsis
Water Commission set rates for distribution of water for irrigation purposes from canal system, and action challenging order was filed by owner and lessee of canal. The District Court of Travis County, 126th Judicial District, Joe Dibrell, J., upheld order for rates for year at issue, but held that extension of rates beyond that year exceeded Commission's statutory authority. Appeal and cross appeal were taken. The Court of Appeals, Aboussie, J., held that: (1) once customers contested rates proposed by supplier for 1990 and invoked Commission's jurisdiction to set reasonable rates, Commission was not restricted by the period of the proposed contract in dispute; (2) nonetheless, parties were free to contract with each other for different rates, customers could file petition to challenge established rates, and supplier could propose higher rates and cause customers to challenge those rates by a new petition; and (3) determinations in connection with setting rates were supported by substantial evidence.

Reversed and rendered in part and affirmed in part.

Attorneys and Law Firms

*337 James K. Rourke, Jr., Austin, for Devers Canal Rice Producers Ass'n, Inc.

Susan E. Potts and Frank M. Reilly, Davidson, Troilo & Booth, Austin, for Trinity Water Reserve, Inc., d/b/a Devers Canal System.

Dan Morales, Atty. Gen., and Steven Baron, Asst. Atty. Gen., Austin, for Texas Water Com'n.

Edward Pickett, Pickett & Pickett, Liberty, for Boyt Realty Co.

Before CARROLL, C.J., and ABOUSSIE and B.A. SMITH, JJ.

Opinion

ABOUSSIE, Justice.

The Texas Water Commission ("the Commission") set rates for distribution of water for irrigation purposes from the Devers Canal System ("the Canal"), effective for 1990 and thereafter. The Canal is owned by Boyt Realty Company ("Boyt") and leased by Trinity Water Reserve, Inc. ("TWR"). The Commission and Devers Canal Rice Producers Association, Inc. ("the Association") assert on appeal that the lower court erred in ruling that the Commission lacked jurisdiction to set prospective rates for the years following 1990. TWR raises by cross-appeal multiple points of error regarding the court's affirmance of the Commission's order setting 1990 rates, claiming evidentiary, procedural, and constitutional violations. We reverse that portion of the district court's judgment concerning post-1990 rates and affirm the remainder of the judgment.

BACKGROUND

In 1990, TWR began leasing the Canal, a two-hundred-mile network of waterways flowing through Liberty, Chambers, and Jefferson Counties. TWR posted a schedule proposing contract rates for the year 1990 averaging $97 per acre for supplying water to neighboring land. Because the parties could not agree on a contract price, the Association, a group of customers in the Canal area, petitioned the Commission to review the reasonableness of TWR's proposed rates pursuant to chapters 11 and 12 of the Water Code.[1] After hearing evidence on what expenses should be included in the rates, the Commission ordered that for 1990 TWR should charge $79.37 for water from the main canal and $84.37 for water from a relift station, the difference reflecting additional costs needed to pump the water from the main canal. It added a surcharge of $6.29 for 1990 to recoup

Exhibit C

expenses for the rate case and repairs made to a damaged flume. The Commission further ordered that the base rates for 1990 would continue in effect until the parties agreed upon a different rate or until the Commission set different rates in a future proceeding.

TWR and Boyt filed an action in the district court challenging the Commission's order. The trial court upheld the order regarding the 1990 rates but held the Commission's decision to extend these rates beyond 1990 exceeded its statutory authority under chapters 11 and 12 of the Water Code.

PROSPECTIVE RATEMAKING

Chapters 11 and 12 are the provisions of the Water Code dealing with "raw" water, which is usually used for irrigational purposes. These chapters provide the framework governing the rights of parties to use ***338** such water and the manner in which rates for the water's use are set.

TWR had proposed rates for only one year, 1990. It contends that the Commission is limited to reviewing the reasonableness of those rates and setting reasonable rates only for the time period of the proposed contract challenged by the Association in their petition. It contends the Commission must wait until the Association or another consumer challenges future proposed rates before setting rates for years following the contractual period at issue in this case. TWR notes chapters 11 and 12 of the Water Code give the Commission no express authority to set future rates.

To resolve this appeal, we must decide whether chapters 11 and 12 of the Water Code authorize the Commission to set prospective rates under these facts. Other regulatory agencies and the Commission itself, under various sections of the Water Code not in issue, [2] have the express power to set rates beyond the immediate year during which an order takes effect. In several instances the Commission or its predecessor agency set rates effective for multiple years, but no party challenged this authority on appeal. *See Knight v. Oldham,* 210 S.W. 567 (Tex.Civ.App.—El Paso 1919, writ ref'd); *Trinity River Auth. v. Texas Water Rights Comm'n,* 481 S.W.2d 192 (Tex.Civ.App.—Austin 1972, writ ref'd n.r.e.); *American Rio Grande Land & Irrigation Co. v. Karle,* 237 S.W. 358 (Tex.Civ.App.—Austin 1922, writ dism'd).

The Legislature granted the Commission broad authority in this area: "The commission shall fix reasonable rates for the furnishing of raw or treated water for *any* purpose mentioned in Chapter 11 or 12 of this code." Water Code § 12.013 (emphasis added). Further, the Legislature impliedly intends an administrative agency to have the necessary powers to perform its required functions. *Sexton v. Mount Olivet Cemetery Ass'n,* 720 S.W.2d 129, 137 (Tex.App.—Austin 1986, writ ref'd n.r.e.).

We stated in *Trinity River* that "it is only after the proprietor of an irrigation system has set water rates that the customer may present a petition to the Commission invoking its jurisdiction." *Trinity River,* 481 S.W.2d at 195. Section 11.041(a) outlines the requirements for the filing of the customer's petition. This statute provides an avenue for a party who has no contract for the use of raw water. The party is nonetheless entitled to the water if (1) the supplier has not contracted to sell this water to third persons and (2) the supplier refuses to contract with the party at a reasonable rate. *LaCour v. Devers Canal Co.,* 319 S.W.2d 951, 953 (Tex.Civ.App.—Beaumont 1959, writ ref'd n.r.e.). There is no dispute that the initial petition filed by the Association complied with the requirements of section 11.041(a). The question is whether, in a proceeding reviewing the petition, the Commission has the authority to set rates not only for the proposed contractual period but also to make them effective prospectively beyond this period.

Trinity River, unlike TWR suggests, does not hold that the Commission cannot set rates beyond the term provided by the proposed contract. This court there held that rates were subject to the Commission's jurisdiction but noted that water users must wait until their suppliers propose rates before petitioning the Commission under section 11.041(a) of the Water Code. *Trinity River,* 481 S.W.2d at 195. We did not hold that a new petition was required to invoke the Commission's jurisdiction for every year following the period in dispute.

***339** Section 11.038(b) of the Water Code provides that if two parties cannot agree on a contract price, the supplier, if his water is not contracted to others, "shall furnish the water necessary for these purposes at reasonable and nondiscriminatory prices." Section

11.036(b) further provides that "if any person uses the stored or conserved water without first entering into a contract ... the user shall pay for the use at a rate determined by the commission to be just and reasonable." One court of appeals has noted that

> [section] 11.036 [of the Water Code] does not mandatorily require a written contract to supply water. Nor does this section give to the supplier the power and prerogative to demand a written contract before supplying water.... [I]f a contract cannot be agreed upon, then those owning or holding a possessory right or title to the land adjoining the canal or any of its parts, are entitled to water at just and reasonable rates. *American Rio Grande Land & Irrigation Co. v. Mercedes Plantation Co.,* 208 S.W. 904 (Tex.Comm'n App.1919, judgm't adopted).

Trinity Water Reserve, Inc., v. Evans, 829 S.W.2d 851, 859–61 (Tex.App.—Beaumont 1992, no writ). So long as TWR was not contractually committed to other third parties, the Association members had a statutory right under the Water Code to use water after 1990, the period of TWR's proposed contract, and pay reasonable rates for this water.

Here, the Commission's order stated that the approved rates "shall continue in effect unless and until the parties agree upon different rates or the Commission sets other rates in a future proceeding." The rates which had been set for 1990 were established as "just and reasonable" rates which would initially apply to post–1990 use of water. By its order, the Commission also recognized the Association's right to use water in the future at reasonable rates, as long as TWR has not contracted all its water to other customers. However, the Commission made no attempt to override the negotiation-review procedures outlined in chapter 11 of the Water Code. The parties were free to contract with each other for different rates. The Commission's reference to a "future proceeding" recognized that the Association may file a petition under section 11.041(a) to challenge the established rates; moreover, TWR may propose higher rates and cause the Association to challenge these rates by a new petition.[3] The Commission had the authority to enforce the Association's statutory right to raw water at a reasonable rate so long as TWR made no other contractual commitments. *See* Water Code §§ 11.036(b), 12.013(a).

TWR suggests that the Commission might have had authority to set future rates had it used a different methodology to calculate post–1990 rates. This issue does not affect the jurisdictional question, which turns on the plain words of the statute and their ordinary meaning.

We hold that a customer may contest the rates proposed by a water supplier by filing a petition under section 11.041(a) of the Water Code and invoking the Commission's jurisdiction to set reasonable rates. ***340** Once its jurisdiction is invoked, the Commission may set reasonable rates in the manner it did and is not restricted by the period of the proposed contract in dispute. The supplier, however, is not prevented from contracting with the petitioning customer or other customers in the future at any rate agreed upon by the contracting parties. The Association and TWR may thus enter into a new contract for future water rates if they find the Commission's rates unacceptable; if they cannot agree on a new price, the Commission retains the authority to review the reasonableness of its rates under a section 11.041(a) proceeding.

We sustain the Commission's and the Association's point of error and turn to the multiple points of error raised on cross-appeal that attack the district court's judgment upholding the Commission's 1990 rates.

1990 RATES

Standards of Review

Section 19(e) of the Texas Administrative Procedure and Texas Register Act (APTRA)[4] sets out the grounds on which a party may seek to reverse an administrative order. TWR claims in several points of error that portions of the order are not reasonably supported by substantial evidence and are arbitrary and capricious, separate grounds under section 19(e) of APTRA for judicial review. *Id.,* (5), (6).

In *City of League City v. Texas Water Commission,* 777 S.W.2d 802 (Tex.App.—Austin 1989, no writ), this Court summarized the substantial evidence test: (1) The findings, inferences, conclusions, and decisions of an agency are presumed to be supported by substantial evidence, and the burden is on the party contesting the order to prove otherwise; (2) in applying the test, the reviewing court is prohibited from substituting its judgment for that of the agency as to the weight of the evidence of questions committed to agency discretion; (3) substantial evidence is more than a scintilla, but the evidence in the record may preponderate against the decision of the agency and nonetheless amount to substantial evidence; (4) the true test is not whether the agency reached the correct conclusion, but whether some reasonable basis exists in the record for the action taken by the agency; and (5) the agency's action will be sustained if the evidence is such that reasonable minds could have reached the conclusion that the agency must have reached in order to justify its action. *Id.* at 805 (citing *Texas Health Facilities Comm'n v. Charter Medical–Dallas, Inc.,* 665 S.W.2d 446, 452–53 (Tex.1984)). Where evidence in the record will support either an affirmative or a negative finding, the agency order must be upheld. Any conflict in the evidence must be resolved in favor of the agency's decision. *Lone Star Salt Water Disposal Co. v. Railroad Comm'n,* 800 S.W.2d 924, 928 (Tex.App.—Austin 1990, no writ).

An agency's actions are generally considered arbitrary and capricious if they are not supported by substantial evidence. *Charter–Medical,* 665 S.W.2d at 454. Even if supported by substantial evidence, though, an agency action may be arbitrary and capricious (1) when the agency has denied the litigant due process, *Lewis v. Metropolitan Savings & Loan Association,* 550 S.W.2d 11, 16 (Tex.1977); (2) when the agency has totally failed to make findings of fact and instead based its decision on findings in another case, *Railroad Commission v. Alamo Express,* 308 S.W.2d 843, 846 (Tex.1958); (3) when the agency has improperly based its decision on non-statutory criteria, *Public Utility Commission v. South Plains Electric Cooperative, Inc.,* 635 S.W.2d 954, 957 (Tex.App.—Austin 1982, writ ref'd n.r.e.); or (4) when the agency has based its decision on ***341** legally irrelevant factors, or failed to consider legally relevant factors. *Consumers Water, Inc. v. Public Util. Comm'n,* 774 S.W.2d 719, 721 (Tex.App.—Austin 1989, no writ).

Future Rates

In TWR's first two points of error, it attacks the Commission's order as requiring "continuous" service "in perpetuity" to the Association. It claims this action was arbitrary and capricious, constituted an unlawful taking, and violated its right to contract. [5] This issue has been addressed above in our treatment of the Commission's point of error.

The Commission's order acknowledges the Association's statutory right to receive water from the Canal in the future at reasonable rates. The order is not arbitrary; it recognizes the parties' right to agree to different rates in future years. The order does not interfere with TWR's right to contract; it remains free to enter into agreements with the Association or other customers, and at rates it may propose.

Further, the order does not unconstitutionally deprive TWR of property without compensation. So long as rates are reasonable, they easily meet constitutional muster. In *Texas Water Rights Commission v. Wright,* 464 S.W.2d 642 (Tex.1971), the Texas Supreme Court upheld a statute that provided for *cancellation* of a water permit upon ten years of non-use. It pointed out that surface water belongs to the state, which may issue permits for the water's beneficial use. *Id.* at 647. The Commission may regulate the use of water owned by the state as long as it does so reasonably. TWR complains that the order requires it to service the Association in perpetuity, even though it may no longer have the statutory right to use the Canal's water in the future. The order, however, makes clear that only qualified customers have such a right. [6]

TWR also asserts that no substantial evidence in the record supports the Commission's rates for post–1990 service. TWR fails to brief this point. We note that the Commission's order merely provides an initial rate found to be reasonable for 1990 but contemplates future negotiations and agency proceedings in later years. The Commission's order does not foreclose further review and rate-setting for future years. We overrule TWR's first and second points of error.

The 1986 Note

TWR's next three points of error attack the decision of the Commission to exclude from the rate calculation principal and interest payments on a 1986 note that Boyt owed the Trinity River Authority (TRA), a governmental

unit. TWR asserts this action was (1) not based on substantial evidence, (2) arbitrary and capricious, (3) based on *ad hoc* rulemaking, (4) a retroactive decision, and (5) precluded by a previous order of the Commission.[7] The decision ***342** TWR complains about was based on historical facts, apparently undisputed, that require some explanation.

The Boyt family owned the Canal from the 1920's until 1969, when TRA purchased it by issuing revenue bonds to the Boyts. In 1986, TRA sold the Canal to Boyt Realty, a company consisting of many of the original bondholders, in return for the note at issue. Interest payments on the note and the bonds were equalized, and the two debts will have the same balloon payment at their end in 2009. The record reflects the Boyts have not canceled these reciprocal debts, possibly due to advantageous federal taxation treatment.

The Commission argues TWR has actually recovered the amount it seeks. The Commission included TWR's 1990 lease of the Canal from Boyt Realty in cost of service in Finding of Fact 33. The lease payment equalled the payments due on the note and bonds in 1990. TWR does not dispute this contention. It attacks other findings that prohibited it from including principal and interest payments on the 1986 note, which it had assumed from Boyt, in cost of service. Even if its attack had merit, TWR provides no reason why customers should in effect have to assume double payments on the note.[8]

The Commission did not allow TWR to include payments on the note because it considered the debt arrangement between TRA and the Boyts to be unreasonable, in part because it was an interested or "affiliated" transaction. TWR complains the Commission used *ad hoc* rulemaking by applying section 13.002 of the Water Code, which defines an affiliate as a person holding indirect control of the voting securities of a utility, as well as those related by blood to such affiliates. While this definition does not directly apply to chapters 11 and 12, the Commission employed its common usage[9] in reaching its determination in Finding of Fact 31 that TWR's rates were unreasonably discriminatory in violation of section 11.038(b) of the Water Code. This finding is what we must review. The affiliated nature of the debt arrangement was merely one factor in this determination.

The Commission feared inclusion of note payments in cost of service would pass on the cost of Boyt's acquisition of the Canal from TRA to water customers. The Commission was concerned with the propriety of a debt structure that continues to exist merely for the benefit of private parties, the Boyt family members, who both own the bonds and owe the note. It considered these arrangements to be interested transactions that are disfavored under the Water Code. Substantial evidence, in the form of undisputed facts, supports the Commission's finding that the payments were unreasonable.

TWR claims the Commission may not retroactively apply the affiliated transaction standard to void the 1969 bonds. The Commission did not "void" the bonds using such a standard; it determined that inclusion of the 1986 note payments in 1990 cost of service was unreasonable.

The Commission also found the capitalized cost of the Canal had already been recovered through depreciation allowances before 1969. Substantial evidence in the record supports this finding.[10] The Commission's ***343** findings were not arbitrary or capricious, either; TWR asserts no additional grounds supporting this contention.

TWR contends that the Commission was barred by *res judicata* from disallowing the payments on the 1986 note by an order it issued in 1971 regarding the value of the TRA bonds and our decision in *Trinity River.* This decision merely affirmed the trial court's temporary injunction that granted water customers relief according to the terms of the Commission's order. We noted the Commission had determined the value of the bonds and agreed that some of this value was recoverable because of the publicly-owned nature of the Canal; however, the Commission rejected the suggestion that the total value must be deemed a reasonable expense. *Trinity River,* 481 S.W.2d at 197–98. The Commission's 1971 order does not preclude its action in the present case. First, different customers and suppliers are involved. TWR and Boyt are not public entities; hence, the earlier reasoning does not apply. Second, the 1971 order apparently did not include the entire cost of the bonds in cost of service. Third, the 1990 proceeding did not involve whether it was appropriate to include the value of the bonds in cost of service *in 1971;* it addressed whether TWR could include payments on the note in 1990. Finally, the debt arrangements the Commission found unreasonable occurred in 1986, long after the first proceeding. The

order did not prevent TRA from meeting payments on the bond; it prevented TWR from charging customers twice the amount necessary to maintain a debt arrangement that existed for the sole benefit of the Boyts. We overrule TWR's third, fourth, and fifth points of error.

Burden of Proof

TWR's sixth point of error contends that the Commission erroneously placed the burden of proof upon it in the rate proceedings. It does not cite any record references supporting this contention. Moreover, it apparently complains that it bore the burden of production. It does not explain how this assignment violated a statute or agency rules. We overrule this point.

TWR's seventh and eight points of error state that either the Association failed to meet its burden of proof or, alternatively, TWR carried its burden. The Water Code and Commission rules do not expressly assign the burden of proof for chapter 11 proceedings, and the record does not address the placement of this burden. TWR concedes it must show that particular findings by the Commission violate section 19(e) of APTRA; the relevant question is whether TWR's rates were reasonable, as required by sections 11.036 and 11.041 of the Water Code. TWR's points six through eight are overruled, as is its thirteenth point, which asserts cumulative error regarding the first six points.

TWR's Expenses

TWR's ninth and eleventh points of error assert that the Commission's decision to disallow various expenses requested by TWR in calculating the final rate was not based on substantial evidence and instead was arbitrary and capricious.

This Court may only overturn an agency decision for lack of substantial evidence, not because it may disagree with the result. *League City,* 777 S.W.2d at 805. When weighing expert testimony, the Commission may accept or reject part or all of each witness's conclusions. It is the final judge regarding the credibility and validity of such testimony. *Southern Union Gas Co. v. Railroad Comm'n,* 692 S.W.2d 137, 141–42 (Tex.App.—Austin 1985, writ ref'd n.r.e.).

Each item disallowed by the Commission was a new expense incurred by TWR that had not previously been included in calculating water rates for the Canal. The ***344** record contains substantial evidence to sustain the Commission's findings.

TWR requested the inclusion of a substantial "raw water" fee, alternatively characterized as a "beginning balance," to sustain them during the off-season when no water would be used for irrigation. The record does not indicate that any such fee has ever been charged or that TWR ever paid a fee for raw water flowing from the Trinity River to the Canal. The Commission rejected what amounted to a request for added profits; it had already allowed recovery of both TWR's lease payments to Boyt and an additional "management fee" to further TWR's economic incentive to operate the canal system. [11]

The Commission denied TWR's request for $150,000 for expenses incurred in the course of this rate case and awarded $45,000 instead, $20,000 for consultation fees and $25,000 for attorney's fees. Bernard Erwin, the Commission's staff expert, and Jacob Pous, the Association's expert, both testified that the amount requested by TWR was too high. The Commission weighed conflicting expert testimony on this issue before reaching its decision.

TWR's costs of purchasing a trackhoe and new trucks were excluded from the final rates. Evidence as to the need for these items was disputed, and the Commission found these expenses had not been shown to be necessary and reasonable because existing equipment or used purchases could adequately perform the same functions. Furthermore, it found the purchases were imprudently incurred by TWR because it was only leasing the Canal and it was unclear whether TWR would purchase the Canal from Boyt. The testimony of Jack Pous and statements of TWR's president, Paul Glass, supported these findings.

TWR's request for including an employee pay raise not yet implemented also was rejected by the Commission. The Commission thus denied a hypothetical expense not actually incurred; furthermore, the evidence did not prove the reasonableness of such a raise.

At the hearing before the Commission, TWR filed a supplemental request seeking an increase in its previously requested amount for power costs. The Commission rejected this request, citing its tardy filing and the need to normalize historical power costs. The record also contains

evidence that actual 1990 power costs were consistent with the amount included in the rates.

TWR's tenth point of error asserts it was denied due process when the Commission refused to hold further hearings and cross-examination of the Commission's staff regarding two conclusions in the Examiner's Report that were modified by the full Commission. The first item involved recouping two costs, flume repairs and rate case expenses, by means of a one-time surcharge in 1990 rather than including them in a future rate base. The second issue involved reducing the fee charged to users of the relift station, from $16 to $5, over the rate charged to users of the main canal. Both modifications came as a result of exceptions to the Examiner's Report the Association filed and the Commission adopted.

These two findings are supported by substantial evidence, including expert testimony favoring the $5 differential. TWR does not dispute the amount assessed for the flume's repair, and we have already upheld the Commission's award of the appropriate amount of litigation and consulting ***345** expenses TWR could recover from customers for this rate case. Allocating specific costs to 1990 customers alone prevents TWR from recognizing a possible windfall in future years for one-time expenses.

TWR contends the Commission used a new methodology in calculating these expenses and, therefore, should have held additional hearings before the examiner. In regard to the flume repairs and rate case expenses, the Commission merely deducted these costs from rate base and calculated a surcharge so only 1990 users would bear these one-time charges: this does not constitute a new methodology. When determining the excess amount chargeable to users of the relift station, the Commission was faced with widely varying calculations by the examiner and parties.[12] Both the Commission's staff and the Association eventually urged continuation of the historical differential of $5 which had previously been recognized in water rates. TWR could hardly have been surprised by the Commission's adoption of the same differential that had always been assessed. Again, this analysis does not constitute a new methodology. Further, Pous's calculations provided evidentiary support for the $5 figure.

The evidentiary support for these two findings distinguishes this case from a decision of this court cited by TWR, *Railroad Commission v. Lone Star Gas Co.*, 611 S.W.2d 908 (Tex.Civ.App.—Austin 1981, writ ref'd n.r.e.). This court held there that the aggrieved party had been denied appropriate procedural safeguards when the Commission had not permitted a party to respond to the use of a methodology unsupported by evidence in the record. *Id.* at 910.

TWR's argument would require the Commission to hold another hearing before the examiner when it sustains a party's exceptions to the Examiner's Report. The Commission is not bound by this report, and it is the Commission's findings which are subject to review. TWR had a chance to respond to the Association's exceptions in writing and also argued against their adoption in the open hearing before the Commission.

TWR cites section 13 of APTRA as allowing parties an unlimited right to cross-examination and multiple hearings. We do not interpret the statute as mandating such procedures.[13] The expenses at issue had been disputed in the hearing before the examiner and substantial time had passed before the open hearing with the Commission was held. TWR had ample opportunity to present its evidence.

We hold that substantial evidence supports the Commission's findings disallowing the expenses discussed above. We further hold these findings were not arbitrary and capricious, and the Commission did not deny TWR due process. We overrule TWR's ninth, tenth, and eleventh points of error.

TWR's twelfth point asserts the Commission's denial of requested expenses unlawfully deprived TWR of its property. We have found that the evidence does not support TWR's claims these expenses were reasonably incurred. Rates are nonconfiscatory as long as they establish a reasonable return for the regulated party, and the state may exclude "dishonest or obviously wasteful or imprudent expenditures." *Missouri ex rel. Southwestern Bell Tel. Co. v. Public Serv. Comm'n,* 262 U.S. 276, 289 n. 1, 43 S.Ct. 544, 547 n. 1, 67 L.Ed. 981 (1923) (Brandeis, J., concurring); ***346** see also *Railroad Comm'n v. Houston Natural Gas Corp.*, 289 S.W.2d 559, 573 (Tex.1956). Further, the state has wide latitude in the regulation of surface water. *See* n. 7, *supra.* We overrule this point.

DISPOSITION OF CAUSE

Having sustained the Commission's and Association's point of error and overruled TWR's points on cross-appeal, we must decide the disposition of this cause. The district court stated in its conclusions of law that it was reserving the issue of whether post–1990 rates were supported by adequate findings of fact and substantial evidence. Ordinarily, we would remand the cause so the lower court could resolve this unanswered issue. In this particular instance, however, such an action would be fruitless. The district court has affirmed the 1990 rate base, which is identical to future rates, as well as the 1990 surcharge. The evidence which the district found supported the Commission's 1990 rates also supports the Commission's decision that such rates would apply in the future, as long as the parties could adjust these rates if circumstances justifying the 1990 rates changed. We have construed the Commission's order as allowing the parties to freely negotiate for different rates or litigate the issue of reasonable post–1990 rates before the Commission in the future. We need not remand the cause to the district court to review evidence it has already found sufficient.

Accordingly, we reverse that portion of the district court's judgment that reverses the portion of the Commission's order setting rates beyond 1990 and render judgment that this portion of the Commission's order be affirmed. We affirm the remainder of the district court's judgment. [14]

All Citations

10 S.W.3d 334

Footnotes

1 All further references to the Water Code are from Tex.Water Code Ann. (West 1988).

2 Chapter 13, for example, explicitly allows the Commission to set prospective rates for the sale of potable water. § 13.186.

3 We interpret the Commission's order to allow TWR to propose new contractual rates, and thus potentially initiate a new proceeding, in order to prevent the order from establishing, in effect, indefinite maximum rates which TWR may charge. Nothing in the Water Code suggests the Commission has the power to mandate long-term rates on its own initiative. Further, TWR notes that raw water market prices are especially subject to change from year to year. This fact, which no party disputes, persuades us that the Legislature did not impliedly grant the Commission such power, either.
The Commission suggests TWR also has the right to petition the Commission for review of post–1990 rates. Section 11.041(a) of the Water Code details a *customer's* right of petition; the Code does not contain an express analogous right for the *seller*. Of course, the seller actually controls the process by proposing new rates In any event, we need not decide the matter in this proceeding.

4 All further references to APTRA are from Tex.Rev.Civ Stat Ann. art. 6252–13a (West Supp.1993)

5 TWR also asserts the district court erred in failing to hold the Commission had no jurisdiction to set future rates. As the district court actually found in TWR's favor, we overrule this contention; moreover, we have already addressed this issue in regard to the Commission's appeal.

6 Conclusion of Law 8 states:

> The owners and/or lessee (if applicable) of the canal system are obligated under 11 036–11.041 of the Texas Water Code to provide continuing service under terms and conditions that are just, reasonable and nondiscriminatory to members of the [Association] and other customer farmers who meet the qualifications of Section 11.038 of the Texas Water Code

The order then commands: "The owners and/or lessee (if applicable) of the canal system shall supply water through the Devers Canal System on a continuing basis to customer irrigators." It does not order TWR to supply the Association if its members no longer qualify under the Water Code

7 TWR also asserts, but does not brief, that the action unlawfully deprived it of its property without compensation. As the state is broadly empowered to license the use of surface water, we do not see how setting conditions for this use in the form of ratemaking constitutes such a taking. *See Wright,* 464 S.W.2d at 647.

8 Since TWR recovered its lease payments, which made payments on the note current, it apparently wishes customers to pay the cost of purchasing an already-built canal from Boyt. TWR does not suggest why this would be a reasonable expense.

9 The idea of an affiliate is found in many regulatory acts. *See* Public Utility Regulatory Act, Tex Rev.Civ.Stat.Ann. art. 1446c, § 3(i) (West Supp.1993); *see also* Gas Utility Regulatory Act, Tex.Rev.Civ.Stat.Ann. art. 1446e, § 1.03(8) (West Supp 1993).

10 The testimony of Association's expert witness, Jack Pous, supports the Commission's finding that all invested capital costs had previously been recovered. TWR complains that exhibits Pous used were improperly admitted. TWR does not, however, point out any affirmative evidence of such capital costs and that these costs were reasonably incurred.

11 The Commission used a cash flow methodology, which allows recovery of reasonable expenses plus a reasonable amount of profit. Recovery of the lease and management expenses totalled $220,000 in profits The Commission supported this figure by calculating that if it used a utility basis methodology, which allows a reasonable rate of return on invested capital plus costs of service, TWR would receive $111,000 in depreciation recovery plus a 10% return on $1,071,000, which would total $218,000. *See* Finding of Fact 36. TWR does not dispute this finding.

12 TWR requested a $52 differential. The Association calculated a $3.81–$5 excess charge. The Examiner's Report suggested $16.18

13 Section 13(a) of APTRA provides, "In a contested case, all parties must be afforded an opportunity for hearing after reasonable notice." Section 13(d) provides, "Opportunity must be afforded all parties to respond and present evidence and argument on all issues involved."

14 The Court originally rendered judgment and handed down an opinion in this cause on April 7, 1993. At that time the Court was unaware that on March 31, 1993, TWR filed a petition for bankruptcy under chapter 11 of the Bankruptcy Code. *In re Trinity Water Reserve, Inc.,* No. 93–10408–S–11 (Bankr.E.D.Tex.). The April 7th opinion and judgment were nullities because of the existence of the automatic stay in bankruptcy. *See* 11 U.S.C. § 362 (1988). The bankruptcy court has now lifted the automatic stay to allow this Court to render judgment and hand down its opinion, and we do so today *See Trinity Water Reserve, Inc. v. Devers Canal Rice Producers Ass'n (In re Trinity Water Reserve, Inc.,* No 93–10408–S–11) No. A–93–1032 (Bankr.E.D.Tex. June 11, 1993).

End of Document

History (2)

Direct History (2)

1. Texas Water Com'n v. Boyt Realty Co.
1993 WL 102115 , Tex.App.-Austin , Apr. 07, 1993

Opinion Superseded by

2. Texas Water Com'n v. Boyt Realty Co.
10 S.W.3d 334 , Tex.App.-Austin , June 23, 1993

481 S.W.2d 192
Court of Civil Appeals of Texas,
Austin.

TRINITY RIVER AUTHORITY
OF TEXAS et al., Appellants,
v.
TEXAS WATER RIGHTS
COMMISSION et al., Appellees.

No. 11916.
|
May 17, 1972.
|
Rehearing Denied June 7, 1972.

Synopsis

Rice farmers and the Trinity River Authority appealed from order of the Water Rights Commission with respect to irrigation water rates. The 126th District Court, Travis County, James R. Meyers, J., entered temporary injunction, and the Authority and its bondholders appealed. The Court of Civil Appeals, O'Quinn, J., held that the Authority and its customers were subject to the rate-making jurisdiction of the Commission, and that the trial court properly entered temporary injunction requiring payment into court of the amount of the Authority's revenues from canal system remaining after allowing for payment of operating expenses and for interest on the Authority's bonded indebtedness.

Affirmed.

Attorneys and Law Firms

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Opinion

O'QUINN, Justice.

This controversy began in February of 1970 with the filing of an application with the Texas Water Rights Commission by J. T. White and more than one hundred other rice farmers in Chambers, Liberty, and Jefferson Counties, whose farm lands are watered by the Devers canal system operated by the Trinity River Authority, requesting the Commission to fix reasonable rates for furnishing water for the crop years of 1970 and thereafter.

After hearing, the Commission, in July of 1971, denied relief to the petitioning rice farmers for the crop years 1970 and 1971, finding that a flat rate of $30.50 for those years, set previously by the Trinity River Authority, was not excessive, but the Commission did find that the rate was unreasonable because it induced wastage of water.

From this order appeal to the district court of Travis County was taken by both the petitioning rice farmers and the Trinity River Authority. The two causes were consolidated by the trial court. The court also ordered joinder of the holders of the 'Devers Canal System Revenue Bonds, Series 1969,' as parties defendant.

White and the other petitioning rice farmers sought a temporary injunction in district court relieving the farmers from liens on their crops upon payment of water charges based on 1968 rates and upon tender into court of the difference between the 1968 water rates and the rates for 1970 and 1971, which were higher than the rates in effect in 1968.

The trial court found that White and the other rice farmers had established a probable right to recover on the merits and that unless temporary relief were granted '. . . Trinity River Authority will in all likelihood have no funds available with which to pay any recovery which may eventually be awarded to J. T. White et al. in this appeal with respect in the 1970 and 1971 crop years.'

The trial court, pending final hearing, enjoined Trinity River Authority from collecting from the farmers more than $29.40 per care for irrigation on the main canal of the Devers system or more than $31.40 per acre from farmers on the Raywood branch of the system. This order was

Exhibit D

conditioned that the farmers tender into the registry of the court $1.10 per acre, being the difference per acre between the 1971 rates and the limits of collection allowed by the court. The court directed that payments of the difference of $1.10 be made through the Trinity River Authority into the registry of the court.

The figure of $1.10 per acre for all acreage irrigated in 1971 is the stipulated amount of Trinity River Authority's revenues from the Devers system remaining after allowing for payment of operating expenses and for interest on the authority's bonded indebtedness.

The bondholders are E. V. Boyt, C. K. Boyt, Ila B. Maxwell and Leila B. Jeffrey, who were owners of the Devers irrigation system prior to its purchase from them by the Trinity River Authority in December of 1969. Revenue bonds, in the face amount of $4,500,000, bearing interest at 4 percent, constituted the principal part of the purchase price.

The Trinity River Authority and the bondholders have appealed from the judgment ***194** of the trial court under which the temporary injunction issued. The Texas Water Rights Commission and J. T. White and associated rice farmers are appellees. All parties have filed briefs.

The principal issues are (1) whether the Texas Water Rights Commission has jurisdiction to fix rates charged by the Trinity River Authority on its Devers system and (2) whether the district court correctly granted temporary relief pending trial on the merits .

We will affirm the action of the district court in overruling contentions below that the Texas Water Rights Commission was without jurisdiction to fix rates on the Devers system and that the trial court was without jurisdiction of an appeal from the order of the Commission. We will also affirm the action of the district court in granting temporary relief.

The Trinity River Authority and the bondholders contend that the Legislature, in creating the Authority in 1955, and by amendatory statutes in 1969, removed the Authority and its customers from the rate making jurisdiction of the Commission. The Trinity River Authority was created under the provisions of an Act of the Legislature now compiled as Article 8280—188, Vernon's Annotated Texas Statutes. (Acts 1955, 54th Leg., ch. 518, p. 1314)

Section 5 of the Act states that 'The Authority is hereby invested with all of the powers of the State under Article XVI, Section 59 of the Constitution to effectuate flood control and the conservation and use, for all beneficial purposes, of storm and flood waters and unappropriated flow waters in the Trinity (River) watershed, Subject only to: (i) declarations of policy by the Legislature as to use of water; (ii) Continuing supervision and control by the State Board of Water Engineers and any board or agency which may thereafter succeed to its duties (now the Texas Water Rights Commission); (iii) the provisions of Article 7471 prescribing the priorities of uses for water, and (iv) the rights heretofore or hereafter legally acquired in water by muncipalities and other users.' (Emphasis added)

Section 24 of the Act of 1955 provides:

'The Authority is authorized and required to acquire water appropration permits directly from the Board of Water Engineers of the State of Texas (now the Texas Water Rights Commission) and may purchase permits from owners thereof. The Authority is also authorized to purchase water, or a water supply, from any person, firm, corporation or public agency, or from the United States or its agencies. Nothing in this Act shall impair the authority granted to the State Board of Water Engineers (now the Commission) Under the general laws of Texas to prescribe rates governing the sale of surface water by or to the Authority.' (Emphasis added)

In 1969 the Legislature amended the Trinity River Authority Act to provide that 'the Authority is hereby specifically empowered to acquire, operate, maintain, and improve the canal system and properties generally known as 'Devers Canal System' . . .' (Section 5(m) of Art. 8280—188, V.A.T.S.; Acts 1969, 61st Leg., ch. 364, p. 1118) In Section 5(n), the Legislature limited the bonds to be used for purchase of the Devers system to revenue bonds by providing that 'in no event shall the Authority be authorized to assess, levy, or collect any tax of any nature whatsoever . . .'

The same Legislature, in 1969, further amended the 1955 Act in Section 8(a), which prescribes the three classes of bonds the Authority is permitted to issue, and in Section 8(g), pertaining to payment of revenue bonds. Only bonds 'secured solely by a pledge of all or part of the revenues accruing to the Authority' are involved in this lawsuit. (Acts 1969, 61st Leg., ch. 156, 488; Secs. 8(a)(2) and 8(g), Art. 8280—188, V.A.T.S.)

***195** Comparison of Sections 8(a) and 8(g), as amended, with the language of these sections as found in the Act of 1955 creating the Authority discloses no significant change in the original language authorizing revenue bonds and making it the duty of the Trinity River Authority to fix rates, tolls, and charges for sales and services sufficient to pay expenses and retire its revenue bonds. We find nothing in the two amendatory Acts of 1969 indicating the Legislature's intent to alter the status of the Authority under the 1955 Act, by which its powers were made subject to '. . . continuing supervision and control . . .' of the Commission (Sec. 5), or to alter provisions expressly preserving authority of the Commission '. . . to prescribe rates governing the sale of surface water by or to the Authority.' (Sec. 24)

Section 8(g), as it appeared in the Act of 1955 and as it reads after amendment in 1969, provides that when bonds are payable wholly from net revenues, it is the duty of the board of directors of the Authority '. . . to fix, and from time to time to revise the rates, tolls, and charges for the sales and services rendered by the Authority . . . to the end that such rates, tolls, and charges, will yield sufficient money to pay: the expense of operating and maintaining the facilities . . . the principal of the interest on said bonds . . . and to create, and maintain the reserve funds and other funds as prescribed in the resolution authorizing, or the trust indenture securing, the bonds.'

When the Authority was created in 1955 it was made subject, in the exercise of its powers, to the continuing supervision and control of the Commission under provisions of Section 5 of the Act and was expressly made subject to rate regulation by the Commission under Section 24. The rate making authority of the Commission began with its predecessor agency, the State Board of Water Engineers, in 1913 with enactment of Articles 7560, 7561, and 7562, Revised Civil Statutes of 1925, (Acts 1913, 33rd Leg., p. 358, ch. 171, secs. 60, 61, 62) brought forward as Section 5.041 of the Texas Water Code (Acts 1971, 62nd Leg., ch. 58), effective August 30, 1971, V.T.C.A. The rate making jurisdiction was expanded in 1918 when the antecedent statute of Article 7563 was enacted to cover furnishing water for any purpose mentioned in the irrigation Act of 1917. (Acts 1918, 35th Leg., 4th C.S., p. 129, ch. 55) As brought forward in the Texas Water Code (Sec. 6.056) the statute empowers the Commission to '. . . fix reasonable rates for the furnishing of water for any purpose mentioned in Chapter 5 or 6 of this code.'

We consider it clear from Article 7560 that it is only after the proprietor of an irrigation system has set water rates that the customer may present a petition to the Commission invoking its jurisdiction. The statute provides: 'If any person entitled to receive or use water from any canal, ditch . . . reservoir or lake . . . or stored supply, shall present to the board (Commission) his petition in writing, showing that the person, association of persons, corporation, water improvement or irrigation district, owning or controlling such water, has a supply of water not contracted to others and available for his use, and fails or refuses to supply such water to him, or That the price or rental demanded therefor is not reasonable and just, or is discriminatory; or that the complainant is entitled to receive or use such water, and is Willing and able to pay a just and reasonable price therefor . . . it shall be the duty of the Board (Commission) to . . . (investigate) and determine whether there is probable ground therefor . . .' (Emphasis added)

We agree with appellees that '. . . the Legislature . . . established in Arts. 7560—7563 a regulatory scheme in which two rate setting bodies . . . have serial jurisdiction.' After the proprietor of an irrigation system has set rates it deems appropriate, a customer of the system ***196** objecting to the rates may appeal to the Texas Water Rights Commission petitioning for rates the Commission shall find reasonable and just to all concerned. We find nothing in the Act of 1955 creating the Trinity River Authority (Art. 8280—188), or in the amendatory Acts of 1969, in conflict with, or inconsistent with, this regulatory scheme for the fixing of water rates.

The Legislature, as already noted, expressly preserved the plan in Section 24 of Article 8280—188 in this language: 'Nothing in this Act shall impair the authority granted to the State Board of Water Engineers (the Commission) under the general laws of Texas to prescribe rates governing the sale of surface water by or to the Authority (Trinity River Authority).'

We hold that after the board of directors of the Authority fixed rates the board deemed appropriate, its customers, J. T. White and associated rice farmers, were entitled to petition the Commission for review of the rates and for the fixing of rates which would be reasonable and just. The Commission had jurisdiction of the matter thus brought before it, and the district court had jurisdiction of the appeals from the order of the Commission.

In considering the second main issue in this case, relating to grant of temporary relief by the trial court, additional facts will be stated.

The Devers canal system as now operated by the Authority consists of about seventy-five miles of main canals and many more miles of laterals. The water intake point is near the community of Moss Bluff, about seven miles south of Liberty, and the system runs generally southeast to the intracoastal waterway at High Island on Bolivar Peninsula.

The system was privately owned and operated as the Devers Canal Company by the Boyt family of Devers, Texas, for more than forty years prior to 1970. During the last ten years of that period the company was pumping more than 120,000 acre feet of water annually to irrigate 25,000 to 30,000 acres of land. In this period a structured rate for water was in effect so that different charges were made for different irrigation water services. In 1968 the average charge per acre was $19.46 based on the structured rate. Under the rate, the sum of all charges which could be made was $22.50 for most of the system, but the average was lower because not all farmers needed or were able to use all water services offered by the company.

The Trinity River Authority and the Boyts began negotiations in 1968 for purchase by the Authority of the Devers system. Since the Authority was without funds to buy the system, negotiations from the outset were conducted on the basis of paying for the system in bonds to be paid from revenues of the system. Representatives of the Authority appear to have considered the system, in terms of replacement cost new less an adjustment for depreciation, to be worth about $2,600,000. The Authority was aware that at the 1968 water rates the Authority could afford to offer the Boyt family bonds in the total face amount of between $2,600,000 and $2,750,000. The Boyts felt the system was worth between $6,000,000 and $7,000,000.

It was known to the Authority that the 1968 water rates would not support more than approximately $2,700,000 in revenue bonds, even on the assumption that the system would water 35,000 acres of land. A tentative agreement was reached, and finally put into effect, under which the Authority offered $4,500,000 in bonds plus the liquid assets of the company amounting to about $500,000. As part of the trade, the Boyts agreed to raise the water rates $4 per acre in 1969, the last year of their private operation of the system.

In the course of negotiations, the Boyts further agreed to pay the Authority $4.40 per acre foot for all water appropriated in excess of 86,000 acre feet under a 1959 contract purporting to establish the fixed rights of the Devers Canal Company. It is ***197** undisputed that this payment would not have been required by the Authority but for the agreement of the Boyts to sell the system to the Authority. This water charge betwen the Authority and the Devers company was discussed by the parties as a justification to the rice farmers for the rate increase in 1969 and was required to be paid before the Authority entered into an option agreement with the Boyts.

Purchase of the system was completed in December of 1969. In January, 1970, the Authority announced its increase of the structured rate which totaled $38 for all charges. White and the associated rice farmers filed their petition with the Commission the following month. The Authority later rescinded its structured rate of $38 and announced a flat rate of $30.50 on the main canal for any and all water services and $32.50 for acreage served through the Raywood relift. The rates as then announced were in effect for the crop years of 1970 and 1971.

Rice production is controlled by the United States Government through a system of allotments which are granted to individual farmers and are not fixed to the land. The rice farmer holding an allotment may move the allotment to water sources where favorable rates will improve his margin of profit. Farmers are shown by the record to be moving their allotments from the Devers system to other water sources east and west of Devers where rates are substantially lower. Following the increase of water rates on the Devers system and with announcement of two allotment cuts in the last three years, the number of farmers and the amount of acreage in the system have decreased each year. In 1969 more than 29,000 acres were planted to rice on land watered by the system, but in 1971 the acreage was less than 22,000. Land rents have become depressed, adversely affecting land values in the area.

It was shown at the trial that a small change in water rates makes a significant difference in the rice farmer's net income. The average farm served by the Devers system consists of about 300 acres . Under present water rates, the average farmer, who may have an investment of as

much as $150,000 in machinery and equipment, will have a present net income of about $7,500 in a crop year.

The Authority steadfastly asserts that water rates on the Devers system must be set high enough to pay operating expenses, estimated for 1971 at $540,000, and to service the bonded indebtedness, amounting in 1971 to $227,000. With the 1970 rates applied to 1971, the Authority did not realize returns sufficient to pay principal and interest after expenses. With continued reduction in customers and acreage, rates in the Devers system must be increased steadily over the life of the forty-year bonds if expenses of operation are to be met and the bonded debt is to be serviced.

The position of the Authority appears to be that the process of setting rates that will produce revenues adequate to pay expenses and debt service is one of mechanically adding expenses and debt service and dividing by the anticipated acreage for the year. The rate then applied to the customers is arrived at without regard to its being reasonable and just.

Boyt and the other bondholders concede that '. . . there is no effective means of forcing people to buy water, gas or electricity from public agencies or to become or to remain customers of publicly-owned utility systems. In all such cases it is the duty of those having the taxing or ratemaking power to levy such taxes or fix such rates as will minimize default and maximize cash flow. Both may reach a pragmatic point of no return.'

The Commission qualifiedly accepts this view. Of it the Commission states, 'If this is the meaning of the 'mandatory duty' sought to be imposed upon the Commission by Appellants, the Commission has little quarrel with the rule. The Commission, on the other hand, vigorously opposes the imposition of the rigid, inflexible rate standard which is apparently sought by the ***198** TRA (Authority) and submits that such a rule would be unreasonable, improper and self-defeating.'

The trial court's order granting temporary relief states: 'Although in fixing rates to be charged by the Trinity River Authority of Texas for furnishing irrigation water through the Devers Canal System, it is proper for the Texas Water Rights Commission to consider the cash flow requirements necessary to enable the Trinity River Authority to meet the operation and maintenance expenses and debtservice requirements on its . . . Revenue Bonds . . . along with other factors, the Court is of the opinion that it is not mandatory that the Commission fix rates adequate to produce such cash flow when such a rate would be unreasonable from the standpoint of the customers of the system.'

White and the associated rice farmers argue that, 'As a matter of simple justice, or perhaps more importantly, economic reality, any revenue financing scheme must be based on a rate structure that deals reasonably and justly with the customer.'

The Commission asserts that it '. . . recognizes fully the importance of municipal revenue bond financing to the construction of needed capital improvements by a public agency and the necessity for preserving the integrity of the covenants which support these bonds. In the order under attack, the Commission recognized, contrary to the contentions of the Rice Farmers, the necessity for 'taking into consideration operation and maintenance costs (and) debt service' . . . and it approved for the crop year 1971 the rates adopted by the TRA (Authority).'

To be entitled to the trial court's temporary injunction, it was not necessary for White and the other rice farmers to assume the burden of proving that they would ultimately prevail. A showing of a probable right and a probable injury was sufficient, and we find that this burden was met. Sun Oil Company v. Whitaker, 424 S.W.2d 216 (Tex.Sup.1968); Ford v. Aetna Insurance Company, 424 S.W.2d 612 (Tex.Sup.1968). It is settled that on appeal the judgment of the trial court must be affirmed on any theory of law applicable to the case regardless of whether the trial court gave a correct reason for the judgment or gave no reason at all. Gulf Land Co. v. Atlantic Refining Co., 134 Tex. 59, 131 S.W.2d 73, 84; Pope v. American National Insurance Co., 443 S.W.2d 377, 381 (Tex.Civ.App. Tyler 1969, writ ref. n.r.e.).

We recognize, as suggested by the Commission, that the basic issue ultimately to be decided in this case is the proper rate standard to be applied, but that '. . . this issue is not ripe for decision on this appeal' and that it '. . . should be decided only after full development of the issues on the merits.' White and the associated rice farmers also '. . . suggest this contest may be more complicated than just a simple choice between two competing rate theories.'

We conclude that the cash flow theory urged by appellants is not the only permissible standard for setting rates. Only after facts have been fully developed at a trial on the merits can an affirmative standard for rate setting be determined.

The Commission and the trial court had jurisdiction, and temporary relief granted by the trial court was proper.

We affirm the judgment of the trial court.

All Citations

481 S.W.2d 192

End of Document

History (1)

Direct History (1)

1. Trinity River Authority of Tex. v. Texas Water Rights Commission
481 S.W.2d 192 , Tex.Civ.App.-Austin , May 17, 1972 , writ refused n.r.e. (Oct 11, 1972)

Tex. Atty. Gen. Op. JM-297 (Tex.A.G.), 1985 WL 189729

Office of the Attorney General

State of Texas
Opinion No. JM–297
March 5, 1985

*1 Re: Jurisdiction over rates charged to customers outside the boundaries of the Lakeway Municipal Utility District

Honorable Tom Craddick
Chairman
Natural Resources Committee
Texas House of Representatives
P.O. Box 2910
Austin, Texas 78769

Dear Representative Craddick:

You inform us that the Lakeway Municipal Utility District [hereinafter the District] was formed in 1972, and in 1974, a group of people living outside the District incorporated under general law provisions and became the Village of Lakeway [hereinafter the Village]. Since incorporation, the Village has not undertaken to provide water for its residents, but instead the Village residents purchase water from the District. In that regard you ask:

What governmental agency or body has jurisdiction over the rates charged to customers outside the boundaries of the Municipal Utility District of Lakeway?

The fixing of domestic utility rates is a legislative function; however, the state legislature may delegate the fixing of such rates to a subordinate body. See Railroad Commission v. Houston Natural Gas Corp., 289 S.W.2d 559 (Tex.1956). The state of Texas has delegated the function of fixing and regulating domestic retail water rates to various state agencies and political subdivisions. Among these agencies and political subdivisions are the Public Utility Commission, the Texas Department of Water Resources, the municipal utility districts, and municipalities of the state. See V.T.C.S. art. 1446c, §§ 16, 17, 22; see also Water Code § 54.519.

We believe that the District has the authority initially to fix rates charged to the residents of the Village. Lakeway Municipal Utility District is a political subdivision of the state organized under chapter 54 of the Water Code. The District was organized in 1972 by order of the Texas Water Rights Commission pursuant to article XVI, section 59 of the Texas Constitution. See Water Code § 54.001 et seq. The District is given authority to supply water and set rates in "areas contiguous to or in the vicinity of the district." See Water Code § 54.519(a), (d). Section 54.519 of the Water Code provides in part:

(a) A district may purchase, construct, acquire, own, operate, repair, improve, or extend all works, improvements, facilities, plants, equipment, and appliances necessary to provide a water system and a sewer system for areas contiguous to or in the vicinity of the district provided the district does not duplicate a service of another public agency. A district shall not provide a water or a sanitary sewer system to serve areas outside the district which is also within a city without securing a resolution or ordinance of the city granting consent for the district to serve the area within the city.

....

Exhibit E

(d) A district is authorized to establish, maintain, revise, charge, and collect the rates, fees, rentals, tolls, or other charges for the use, services, and facilities of the water and sewer system which provide service to areas outside the district which are considered necessary and which may be higher than those charged for comparable service to residents within the district.

*2 (e) The rates, fees, rentals, tolls, or other charges shall be at least sufficient to meet the expense of operating and maintaining the water and sewer system serving areas outside the district and to pay the principal of and interest and redemption price on bonds issued to purchase, construct, acquire, own, operate, repair, improve, or extend the system. (Emphasis added).

At the time the District began providing water to the areas now constituting the Village, the Village was not an incorporated municipality. Thus, it is our conclusion that the District has jurisdiction to establish the initial retail rates for water services to residents of the Village. See Texas Water Rights Commission v. City of Dallas, 591 S.W.2d 609 (Tex.Civ.App.—Austin 1979, writ ref'd n.r.e.); cf. Lower Colorado River Authority v. City of San Marcos, 523 S.W.2d 641, 645 (Tex.1975) (home rule city presents a different situation). We note that the Village of Lakeway has no different situation). We note that the Village of Lakeway has no jurisdiction to regulate the rates charged by the District to its residents. See Village of Lakeway v. Lakeway Municipal Utility District No. 1, 657 S.W.2d 912 (Tex.App.—Austin 1983, writ ref'd n.r.e.).

Section 11.041(a) of the Water Code authorizes "[a]ny person entitled to receive or use water from any ... lake or from any conserved or stored supply [to] present to the [Texas Water Commission] a written petition" to contest the rates charged by the District. See Water Code § 11.041(a)(1, 2, 3); see also Texas Water Rights Commission v. City of Dallas, supra at 612. The Texas Water Commission is further authorized "to fix reasonable rates" for the water supplied to the Village by the District. See Water Code § 12.013. See also Texas Water Rights Commission v. City of Dallas, supra. Therefore, we conclude that any person residing within the District or the Village may petition the Texas Water Commission to review the rates charged by the District. The Texas Water Commission may then determine whether the rates charged by the District to the residents of the Village are reasonable.

SUMMARY

The Lakeway Municipal Utility District is authorized pursuant to section 54.519 of the Water Code to fix water rates charged to residents of the Village of Lakeway. In addition, the Texas Water Commission has jurisdiction, pursuant to sections 11.041 and 12.013 of the Water Code, to review the rates charged by the District as to reasonableness.

Very truly yours,

Jim Mattox
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First Assistant Attorney General
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Tex. Atty. Gen. Op. JM-297 (Tex.A.G.), 1985 WL 189729

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